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GOVERNMENT OF MALAYSIA v. LOW TAEK JHO

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[CIVIL SUIT NO: PA-21NCVC-1-01-2021]
17 OCTOBER 2022

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Abstract – *(i) When proceedings are commenced under O. 14 of the Rules of Court 2012, the normal rules for triable issues do not apply to a tax claim because of the provisions of the Income Tax Act 1967; and (ii) The court has no power in tax claim proceedings, to consider any assertion that the assessed tax amount is excessive or incorrectly assessed. For any manner of challenge to the merits, propriety or correctness of the tax assessment, including assertions that the Lembaga Hasil Dalam Negeri did not observe the rules of natural justice or that it acted arbitrarily or in a non-judicial manner, the taxpayer is to raise it before the Special Commissioners of Income Tax.*

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CIVIL PROCEDURE: *Summary judgment – Application for – Tax claim – Failure to submit tax returns by prescribed statutory deadlines – Amount of RM1,053,972,936.58 – Whether there were triable issues – Whether there were reasons warranting trial to decide on claim – Whether summary judgment ought to be granted – Rules of Court 2012, O. 14*

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REVENUE LAW: *Income tax – Summary judgment – Failure to submit tax returns by prescribed statutory deadlines – Amount of RM1,053,972,936.58 – Whether claim caught by limitation – Whether material facts pleaded to support statutory cause of action to recover tax amount – Whether assessments issued without complying 'jurisdictional threshold requirements' in Income Tax Act 1967 – Whether notice of assessment served on defendant at his then-current residential address – Whether defendant a non-resident individual – Whether defendant no longer Malaysian tax resident – Whether summary judgment ought to be granted*

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In this tax claim, the plaintiff ('LHDN') sought a summary judgment in the amount RM1,053,972,936.58 be entered against the defendant. The LHDN asserted that the defendant failed to submit tax returns for years of assessment 2013 and 2014 by the prescribed statutory deadlines (not later than 30 April in year following the year of assessment). As a result, the LHDN issued notices of assessment to the defendant for the sums of RM202,575,166.56 for 2013 and RM755,582,048.52 for 2014. The defendant did not pay the tax assessed within the prescribed 30-day limit. As a consequence, a 10% increase was imposed on the assessed tax amounts. The respective increases were RM20,257,516.65 for 2013 and RM75,558,204.85 for 2014. The eventual total tax payable for 2013 and 2014 was RM1,053,972,936.58, which the defendant failed to pay. The defendant denied that he was liable to pay the tax. In his defence, the defendant submitted that: (i) the 2013 and

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2014 assessments were void, illegal and invalid as they were made more than five years after the years of assessment, without complying with sub-s. 91(3) of the Income Tax Act 1967 ('Act'). To invoke the operation of sub-s. 91(3), the LHDN must first plead fraud, wilful default or negligence. Since the LHDN did not plead fraud, wilful default or negligence, this was a defence to the tax claim and summary judgment should not be given; (ii) the LHDN did not plead the basis for the assessments and hence, failed to set out a cause of action; (iii) the LHDN issued the assessments without complying with the 'jurisdictional threshold requirements' in the Act; (iv) the notices of assessment were sent to an address which was no longer the defendant's residential address; (v) the defendant was a non-resident individual and Malaysia was not his country of residence; (vi) the defendant in his letter dated 10 August 2011, had informed the LHDN that he would be moving out of Malaysia to work abroad for the long term and would no longer be a Malaysian tax resident; (vii) the amounts stated in the statement of claim for 2013 and 2014 were not income accrued in nor income derived from Malaysia; (viii) the LHDN did not plead whether the assessments were issued under ss. 90(3), 91, 91A, 92 or 96 of the Act; and (ix) the LHDN could not rely on the s. 142 certificate. The defendant further submitted that there was 'some other reason' that warranted a trial of this tax claim as a result of the 1MDB Suit 330 against him, specifically, (i) by filing this tax claim but not disclosing whether the tax amount claim was part of the money claimed in Suit 330, the LHDN had taken inconsistent positions and committed an abuse of process; and (ii) this court was not prohibited from entertaining the issue of an abuse of process and should do so at the trial.

Held (allowing application to enter judgment for RM1,053,972,936.58 with interest):

(1) The Federal Court case of *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* held that the issue of limitation was for the Special Commissioners of Income Tax ('Special Commissioners'), not for the courts, to decide. This court was bound to follow the Federal Court's precedent. It is up to the Special Commissioners to make the findings of fact relating to the issue of limitation. It is also up to the Special Commissioners if there is a proceeding before them, to determine whether there was fraud, wilful default or negligence on the part of the defendant in relation to tax. (paras 54-56)

(2) The basis for the LHDN's statutory tax claim was that the notices of assessment to pay tax (based on the Act) were issued to the defendant (based on the Act) and the defendant did not pay. The LHDN then filed this tax claim to recover the tax amount as a debt due to the Government (again, based on the Act). The LHDN adequately pleaded the material facts to support its statutory cause of action to recover the tax amount assessed as a debt due and payable. This court was also bound by the

A authority of *Chong Woo Yit v. Government Of Malaysia* which held that once the notices of assessment are served on the defendant, the tax is payable (sub-s. 103(2) of the Act). Any tax that is due and payable are recoverable through a tax claim proceeding as a debt due (sub-s. 106(1) of the Act). Also, the s. 142 certificate constitutes conclusive evidence B that the tax amount stated in it is due (sub-s. 142(1) of the Act). (paras 58-61)

(3) It was unclear as to what specifically were the 'jurisdictional threshold requirements' that the defendant alluded to but it was clear that this assertion was a challenge against the legality of the assessments. It was C not open to the defendant to raise this issue of legality as a triable issue in an O. 14 proceeding of a statutory tax claim. In a tax claim for the recovery of tax, the taxpayer cannot say to the presiding court that the assessment was not made in accordance with the provisions of the Act. (paras 64, 65 & 68)

D **(4)** Under the Act, the LHDN did not have the obligation to serve the notices of assessment on the defendant at his then-current residential address. The LHDN served the notices of assessment on the defendant by registered post. The notices of assessment sent by registered post were deemed properly served on the defendant for the purposes of the E Act if they were sent to the defendant's last known address. There was no reason to doubt that the address that the LHDN used was the defendant's last known address. Further, the defendant presented no evidence to substantiate that the address that was used was not the defendant's last known address. In any event, the defendant did not deny F receiving the notices of assessment. (paras 72-75)

(5) There was no statement in the defendant's letter dated 10 August 2011 that he would no longer be a Malaysian tax resident. Further, the defendant's letter and the LHDN's letter concerned the defendant's tax for either the years of assessment 2010 or 2011. However, the years of G assessment relevant to this tax claim was 2013 and 2014. (paras 82 & 86)

(6) As this was a statutory tax claim for the recovery of debt, the source of income issue must be dealt with by the Special Commissioners, not by the court. In any event, sub-s. 97(1) of the Act also gives an answer to H this issue. If a taxpayer does not lodge an appeal against the assessment, the assessment becomes 'final and conclusive' for purposes of the Act, which means for the purposes of this tax claim. (paras 90 & 91)

(7) There was no requirement for the LHDN to specify under which I provision the assessments were issued. In any event, in the LHDN's statement of claim, the LHDN had in fact specified that the notices of assessment were issued under sub-s. 90(3) of the Act. It was also not

necessary for the LHDN to plead the provisions of the Act under which the assessments were issued as long as the LHDN pleaded the material facts necessary to bring the LHDN within the scope of the Act. The LHDN had sufficiently pleaded the material facts to come under the Act to sustain this tax claim. (paras 93-96 & 98)

(8) The LHDN had established the basis for this tax claim, which was the Act. The LHDN brought itself under the provisions of the Act and founded its cause of action. Assessments were issued to the defendant but the defendant did not pay the tax assessed. Sub-section 142(1) of the Act contained clear terms. The certificate constituted sufficient evidence to prove the LHDN's tax claim for the amount stated in it. The certificate was also sufficient authority for the courts to grant judgment against the defendant for the amount. (paras 100-102)

(9) This court was not satisfied that the fact that Suit 330 was brought against the defendant, coupled with the argument that with 'further investigation', the court may find that the money claimed in Suit 330 may be the same money as the tax money in this tax claim, or that the court may find that the LHDN had committed an abuse of the court process by bringing this tax claim – created a circumstance that there was 'some other reason' to warrant a trial. Further, the trial of this tax claim, if there is going to be one, would not be spent investigating whether the LHDN had abused the process of the court by filing this tax claim against the defendant to recover tax as a debt. (paras 123 & 125)

(10) The allegation that filing this tax claim was an abuse of process, was a challenge against the propriety of the LHDN's tax assessment. The defendant was effectively asserting that the LHDN either should not have made any tax assessment at all or should not have made the tax assessment for RM1,053,972,936.58 (because this tax claim money might be the same money as the money claimed in Suit 330). This bores directly on the 'incorrectly assessed' prohibited plea and likely to bear on the 'excessive' plea too. Sub-section 106(3) of the Act states that the court was not to entertain these categories of pleas. Further, besides annexing Suit 330's amended writ and statement of claim to his written submissions in reply, the defendant had not produced any evidence (whether by affidavit or documentary evidence) that the filing of this tax claim was an abuse of process. There was also no evidential basis to support an inference that there was a likelihood of an abuse of process. (paras 127-128)

(11) There was neither a triable issue nor 'some other reason' for there to be a trial to determine this statutory tax claim. The LHDN's application to enter judgment for RM1,053,972,936.58 with interest was allowed. (para 131)

Case(s) referred to:

Arumugam Pillai v. Government Of Malaysia [1975] 1 LNS 2 FC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Chong Woo Yit v. Government Of Malaysia [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9 SC ***(refd)***

Government Of Malaysia v. Mohd Najib Hj Abd Razak [2020] 1 LNS 754 HC ***(refd)***

Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd [2018] 9 CLJ 184 CA ***(refd)***

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***

Kerajaan Malaysia v. Mudek Sdn Bhd [2017] 10 CLJ 158 FC ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

Miles v. Bull [1968] 3 All ER 632 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Noh Hyoung Seok v. Perwira Affin Bank Bhd [2004] 2 CLJ 64 CA ***(refd)***

Sun Man Tobacco Co Ltd v. Government Of Malaysia [1973] 1 LNS 144 FC ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA ***(refd)***

United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 3, 77, 90(3), 91(3), 91A, 92, 96, 97(1), 99, 103(2), (5), 106(1), (3), 142(1), 145(1), (2)(c)

Real Property Gains Tax Act 1976, s. 23(3)

Rules of Court 2012, O. 14 rr. 1(1), 3(1)

For the plaintiff - Norhisham Ahmad & Komathi Karuppanan; Inland Revenue Board of Malaysia

For the defendant - Yatiswara Ramachandran, Francis Tan, Kenny Chan Yew Hoong, Oh Choong Ghee & Leslie Ho Ying Sien (Pupil); M/s Valen, Oh & Partners

Reported by Lina E

JUDGMENT

Kenneth St James JC:

Prelusion

[1] This is a tax claim – for RM1,053,972,936.58. The plaintiff (LHDN) seeks a summary judgment for this amount. Should summary judgment be entered against the defendant?

Key Asserted Facts

[2] The LHDN asserts that the defendant failed to submit tax returns for the years of assessment 2013 and 2014, by the prescribed annual statutory deadlines. Tax returns must be submitted not later than 30 April in the year following the year of assessment. As a result, the LHDN issued notices of assessment to the defendant for the sums of RM202,575,166.56 for 2013 and RM755,582,048.52 for 2014.

[3] The defendant did not pay the tax assessed within the prescribed 30-day time limit. As a consequence, a 10% increase was imposed on the assessed tax amount. The respective increases were RM20,257,516.65 for 2013 and RM75,558,204.85 for 2014.

[4] The eventual total tax payable for 2013 and 2014 was RM1,053,972,936.58. The defendant failed to pay this amount. Hence this tax claim.

[5] The defendant denies that he is liable to pay the tax.

The Pertinent Income Tax Act Provisions

[6] It is necessary that I first set out the pertinent provisions of the Income Tax Act 1967 (the Act) to understand the LHDN's case and the defendant's defence. This will also explain the Malaysian tax regime and its procedure for recovery.

[7] Section 3 provides that income tax will be charged on a taxpayer's income which is "accruing in or derived from Malaysia or received in Malaysia from outside Malaysia". For reference, s. 3 is set out here:

> **Section 3. Charge of income tax.**
>
> Subject and in accordance with this Act, a tax to be known as **income tax shall be charged** for each year of assessment **upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia**.
>
> (emphasis added)

[8] Section 77 provides that every person (a taxpayer) must submit a "return of income" (a tax return) for every year of assessment. The relevant portions of s. 77 are here:

> **Section 77. Return of income by a person other than a company, limited liability partnership, trust body or co-operative society.**
>
> (1) **Every person**, other than a company, limited liability partnership, trust body or cooperative society to which s. 77A applies, **shall for each year of assessment furnish to the Director General a return** in the prescribed form:
>
> (a) in the case of that person who is carrying on a business, not later than 30 June in the year following that year of assessment; or
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> (b) in any other case than the case in paragraph (a), not later than 30 April in the year following the year of assessment:
>
> Provided that that person has:
>
> (a) chargeable income for that year of assessment; or

A (b) no chargeable income for that year of assessment, but has chargeable income or has furnished a return or has been required under this Act to furnish a return, for the year of assessment immediately preceding that year of assessment.

(4) For the purposes of this section, a return for a year of assessment shall:

B (a) specify the chargeable income and the amount of tax payable (if any) on that chargeable income for that year; and

(b) contain such particulars as may be required by the Director General.

C (emphasis added)

[9] Section 90 provides that if a taxpayer does not submit a tax return, the LHDN will assess the tax amount that the taxpayer has to pay. The relevant portions of s. 90 are here:

D **Section 90. Assessments generally.**

(1) Where a person has furnished a return in accordance with s. 77 … to the Director General for a year of assessment, the Director General shall be deemed to have made, on the day on which the return is furnished, an assessment in respect of that person in the amount of tax on the E chargeable income, the tax and the chargeable income being the respective amounts as specified in the return.

(2) For the purposes of this Act, where the Director General is deemed to have made an assessment under sub-s. (1):

F (a) the return referred to in that subsection shall be deemed to be a notice of assessment; and

(b) the deemed notice of assessment shall be deemed to have been served on the person on the day on which the Director General is deemed to have made the assessment.

G (3) **Where a person** for a year of assessment **has not furnished a return in accordance with section 77** …, **the Director General may according to the best of his judgment determine the amount of the chargeable income of that person for that year and make an assessment accordingly**:

Provided that the making of an assessment in respect of a person under this subsection shall not affect any liability otherwise H incurred by that person by reason of his failure to deliver the return.

(emphasis added)

[10] Section 91 provides that if the LHDN decides that no assessment or an insufficient assessment is made on a taxpayer, the LHDN may within five I years of the year of assessment, make an assessment of the tax that the taxpayer has to pay.

[11] But, if the LHDN decides that the taxpayer has committed a form of fraud or wilful default, or that the taxpayer has been negligent, then limitation does not apply. The LHDN can, "at any time", make an assessment of the tax that the taxpayer has to pay, to make good "any loss of tax attributable to the fraud, wilful default or negligence".

[12] The relevant portions of s. 91 are here:

> **Section 91. Assessments and additional assessments in certain cases**
>
> (1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within five years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.
>
> (3) The Director General *where it appears to him* that:
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> (a) *any form of fraud or wilful default has been committed by or on behalf of any person*; or
>
> (b) *any person has been negligent*,
>
> in connection with or in relation to tax, *may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence* in question.
>
> (emphasis added)

[13] Section 96 provides that where the taxpayer does not submit a tax return, and the LHDN makes an assessment on the taxpayer, the LHDN must serve the notice of assessment on the taxpayer. The relevant portions of s. 96 are here:

> **Section 96. Notice of assessment**
>
> (1) As soon as may be after an assessment, other than an assessment under subsections 90(1) [where the taxpayer does not submit a tax return] and 91A(1), has been made, the Director General **shall cause a notice of assessment to be served** on the person in respect of whom the assessment was made.
>
> (emphasis added)

[14] Section 97 provides that if the taxpayer does not submit a notice of appeal against an assessment, then the LHDN's assessment of the tax payable is final and conclusive for the purpose of a tax claim under the Act. The relevant portions of s. 97 are here:

Section 97. Finality of assessment

(1) **Where**:

(a) **no valid notice of appeal against an assessment has been given** under s. 99 within the time specified by that section (or any extension thereof); **the assessment** as made, agreed to or determined **shall be final and conclusive for the purposes of this Act**.

(emphasis added)

[15] Section 99 provides that a taxpayer who is aggrieved by the assessment made for him/her can appeal to the Special Commissioners of Income Tax, by submitting a written notice of appeal in the prescribed form, stating the grounds of appeal. The relevant portions of s. 99 are here:

Section 99. Right of appeal

(1) **A person aggrieved** by an assessment made in respect of him **may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days** after the service of the notice of assessment ... **a written notice of appeal in the prescribed form** stating the grounds of appeal and containing such other particulars as may be required by that form.

(emphasis added)

[16] Subsection 103(2) provides that where a taxpayer does not submit a tax return, and the LHDN makes an assessment on that taxpayer, the tax stated as payable under the assessment is due and payable under the Act, whether or not the taxpayer appeals against the assessment to the Special Commissioners. And sub-s. 103(5) provides that if the tax amount assessed is not paid within time, it is mandatory that the tax amount be increased by 10%, and the entire increased amount becomes due and payable under the Act.

[17] The relevant portions of s. 103 are here:

Section 103. Payment of tax

(1) Except as provided in subsection (2), tax payable under an assessment for a year of assessment shall be due and payable on the due date whether or not that person appeals against the assessment.

(2) **Where an assessment is made under s. 90(3)**, 91, 92 or 96A, or where an assessment is increased under s. 101(2), **the tax payable under the assessment** or increased assessment **shall**, on the service of the notice of assessment or composite assessment or increased assessment, as the case may be, **be due and payable on the person assessed** at the place specified in that notice **whether or not that person appeals against the assessment** or increased assessment.

(5) ... **where any tax due and payable under subsection (2) has not been paid within thirty days** after the service of the notice, **so much of the tax as is unpaid** upon the expiration of that period **shall without any further**

notice being served **be increased by a sum equal to ten per cent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under this Act**.

(emphasis added)

[18] Subsection 106(1) provides that the LHDN can recover, by court proceedings, the tax due and payable as "a debt due to the government". And sub-s. 106(3) provides that in such court proceedings, the taxpayer cannot raise, and the court cannot consider, the issue that "the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased". Subsections 106(1) and 106(3) are set out here:

Section 106. Recovery by suit

(1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

...

(3) In any proceedings under this section **the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased** under sub-s. 103(3), (5) or (7).

(emphasis added)

[19] Subsection 142(1) provides that for this tax claim, the LHDN's certificate, signed by the Director General of Inland Revenue stating the tax amount due from a taxpayer, is "sufficient evidence of the amount so due" and is "sufficient authority for the court to give judgment for that amount". Subsection 142(1) is set out here:

Section 142. Evidential provisions.

(1) In a suit under s. 106 the production of **a certificate signed by the Director General giving** the name and address of the defendant and **the amount of tax due** from him **shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount**.

(emphasis added)

[20] Subsection 145(1) provides that for the purposes of the Act, notices may be served by three means or modes – personally, or by ordinary post, or by registered post. Then sub-s. 145(2)(c) provides that "a notice relating to tax", such as a notice of assessment, which is sent by ordinary or registered post are "deemed to have been served" on a taxpayer, if it is addressed to the taxpayer's "last known address".

[21] The relevant portions of s. 145 are set out here:

Section 145. Service of notices.

(1) Subject to any express provision of this Act, for the purposes of this Act **notices may be served personally or by ordinary or registered post**.

A (2) **A notice relating to tax which is sent by ordinary or registered post shall be deemed to have been served** on the person (including a partnership) to whom it is addressed on the day succeeding the day on which the notice would have been received in the ordinary course of post **if it is addressed**:

B (c) **in the case of an individual, to his last known address**.

(emphasis added)

The Governing Principles For Order 14 Applications For Summary Judgment

C **[22]** From the terms of O. 14 of the Rules of Court 2012, there are these principles that I am mindful to follow:

(i) If the defendant satisfies the court that there is a triable issue, that is, "an issue or question in dispute which ought to be tried"– summary judgment should not be given.

D (ii) If the defendant satisfies the court that there is "some other reason" that warrants a trial – summary judgment should not be given.

(iii) The defendant can show cause against the application for summary judgment – that is: defeat the application – by affidavit evidence "or otherwise", to the satisfaction of the court.

E **[23]** For reference, O. 14 is set out here:

O**rder 14. Summary judgment**

Application by plaintiff for summary judgment (O. 14 r. 1)

F 1. (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, **the plaintiff may, on the ground that the defendant has no defence to a claim** included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, **apply to the Court for**

G **judgment** against that defendant.

Judgment for plaintiff (O. 14 r. 3)

3. (1) **Unless** on the hearing of an application under rule 1 either the Court dismisses the application or **the defendant satisfies the Court** with respect to the claim, or the part of a claim, to which the application relates **that**

H **there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial** of that claim or part, **the Court may give such judgment** for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

I **Leave to defend (O. 14 r. 4)**

4. (1) A defendant may show cause against an application under rule 1 **by affidavit or otherwise to the satisfaction of the Court.**

(3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.

(emphasis added)

[24] From case law, there are also principles that I am mindful to heed. The first is the principle that when the defendant shows cause against the grant of a summary judgment by asserting certain facts or issues or reasons that bear on the merits of the application for summary judgment, I am not bound to accept those assertions just because the defendant made them. I must evaluate the cogency of the assertion, and consider whether the assertion is tenable, or plausible, or reasonable: *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400 (SC).

[25] The Supreme Court in *Bank Negara Malaysia* (*supra*) enunciated it like this at pp. 19 to 20 (CLJ); p. 408 (MLJ):

In our view, basic to the application of all those legal propositions, is the requirement under O. 14 for *the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case* as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v. Letchumanan* 5 had this to say at p 217:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, *this does not mean that he is bound to accept uncritically*, as raising a dispute of fact which calls for further investigation, *every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents* or other statements by the same deponent, *or inherently improbable in itself it may be*.

Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. *Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable*. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. *Thus, apart from identifying the issues of fact or law, the court must go one step further and determine*

A *whether they are triable*. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under
B *O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment* merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v. Casey* 6 and *European Asian Bank AG v. Punjab & Sind Bank* 7 at p 516.)

(emphasis added)

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[26] The second principle is that I must evaluate whether the facts or issues or reasons raised by the defendant amount to a "fairly arguable defence" to this statutory tax claim, such that I have a "reasonable doubt" against granting judgment summarily: *Malayan Insurance (M) Sdn Bhd v. Asia Hotel*
D *Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182; [1987] 2 MLJ 183 (SC).

[27] The Supreme Court in *Malayan Insurance* (*supra*), although it held against the granting of a summary judgment by the High Court, propounded the principle in this way: at p. 184 (CLJ); pp. 184 and 185 (MLJ):

E ... If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment.

The underlying philosophy in the Order 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment ...

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(emphasis added)

[28] The third principle is that the question that I am to determine, when I consider the facts or issues or reasons raised by the defendant, is – are they *bona fide* triable issues? – *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995]
G 1 CLJ 609; [1995] 1 MLJ 281 (CA); [1995] 1 AMR 622.

[29] The Court of Appeal in *Ng Hee Thoong* (*supra*), referred to a Supreme Court of British Columbia case, and reasoned as follows: at pp. 616 to 617 (CLJ); pp. 289 to 290 (MLJ):

H It is important to bear in mind that O 14 is a summary judgment procedure and not a summary trial procedure. The distinction is well brought out in *Bank of British Columbia v. Anglo-American Cedar Products* (1985) 57 BCLR 350, a decision at first instance of the Supreme Court of British Columbia ... Our O 14 is in *pari materia* with their r 18 ... Macdonald J, explained ...

I ... *Since Hughes v. Sharp* (1969) 68 WWR 706; 5 DLR (3d) 760 (BCCA), it has been well established that *a litigant is not to be deprived of a trial under r 18 unless it is manifestly clear that he is without a defence that deserves to be tried or that his case discloses no facts which*

could provide him with a defence. The question, under r 18, is whether there is a *bona fide* triable issue. That position was reconfirmed in *Memphis Rogues Ltd v. Skalbania* (1982) 38 BCLR 193 at p 202 29 CPC 105 (CA):

The question has been stated in a number of ways: Is there no real substantial question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry, namely, is there a bona fide triable issue?

(emphasis added)

[30] The fourth principle is that the defendant can show cause or raise triable issues "by affidavit or otherwise". This means that the defendant can raise facts or issues or reasons that are outside of what he has raised in his defence and the affidavit in reply filed on his behalf (which is actually his US attorney's affidavit): *Noh Hyoung Seok v. Perwira Affin Bank Bhd* [2004] 2 CLJ 64; [2004] 2 MLJ 203 (CA); [2005] 3 AMR 655.

[31] The Court of Appeal in *Noh Hyoung Seok* (*supra*) stated as follows: at pp. 73 to 75 (CLJ); pp. 210 to 212 (MLJ):

Moreover the appellant, in an O 14 application can seek leave to defend by 'affidavit or otherwise' (O 14 r 4(1)) ...

Order 14 r 4(1) provides a situation where, once the plaintiff has made out a *prima facie* case, the onus shifts to the defendant to show cause why the judgment should not be entered against him 'by affidavit or otherwise.'

...

In the context of O 14 r 4, the court will not decide the O 14 application by weighing both plaintiffs and defendant's affidavit **but must look at the matter in its entirety to ascertain whether the defendant has a real or *bona fide* defence**.

Just suppose the defendant's assertion in the affidavit is not credible, there is no fair or reasonable probability of the defendant having a defence See *Banque de Paris v. de Narav* [1984] 1 Lloyd's Rep 23 and *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim* [1985] 2 MLJ 225 where from the facts and circumstances of the case as a whole, the defendant had failed to show a *bona fide* defence to the claim.

...

The defendant may also show cause by serving a full and *bona fide* defence setting out triable issues before the issue of the summons: see Gill CJ's observation in *Alliance (Malaya) Engineering Co Sdn Bhd v. San Development Sdn Bhd* [1974] 2 MLJ 94.

...

In keeping with the exacting standards to be observed before such summary powers can be invoked in an O 14 application, **the defendant is**

A **entitled to show, over and above what has been pleaded in the statement of defence that he has other defences**.

...

Thus in an application such as this, it is certainly open to the defendant to raise his defence even in the absence of a statement of defence and
B affidavit filed, and this is especially compelling when it is a question of law. In this case such question of law was discernible from the respondent's own documents.

Under this rule (O 14 r 4) even if the defendant cannot point to a specific issue which ought to be tried, but the defendant nevertheless satisfies the
C court that there are circumstances that ought to be inquired into, then the words 'affidavit evidence or otherwise' in this rule would serve this purpose.

...

For completeness, it is also not the function of the trial judge in an
D O 14 application to delve into the merits of the case and decide whether the defendant is likely to succeed or fail.

His is merely to scrutinize the defences of the defendant and test them *inter alia*, against the language of O 14 r 4 to determine whether they come up to scratch, as a plausible defence. He must also bear in mind the
E cautionary words of Thomson CJ, in *Syn Lee & Co Ltd v. Bank of China* [1961] MLJ 87, which place importance on the ruling that as long as the defendant raises even one issue for trial, the plaintiffs case will necessarily disintegrate.

Thus it bears emphasis here that the language of O 14 r 4 is unequivocal
F in its imperative that the defendant is able to raise issues as defences even in the absence of a statement of defence or affidavit filed.

(emphasis added)

A Summary Of The Case Law On Tax Claims Brought Under The Act

G **[32]** I set out here a summary of the principles that are established in Malaysian tax law, which bind and guide me to arrive at this judgment.

[33] From *Sun Man Tobacco Co Ltd v. Government Of Malaysia* [1973] 1 LNS 144; [1973] 2 MLJ 163 (FC), I gleaned these principles:

H (i) In tax claim proceedings, the court has no power to consider any assertion that the assessed tax amount is excessive, incorrectly assessed, under appeal or incorrectly increased – now codified as sub-s. 106(3).

(ii) For any manner of challenge to the merits, propriety or correctness of the tax assessment, including assertions that the LHDN did not observe
I the rules of natural justice, or that the LHDN acted arbitrarily or in a non-judicial manner – the taxpayer is to raise it before the Special Commissioners.

[34] The Federal Court in *Sun Man Tobacco* (*supra*) held as follows: at MLJ pp. 164 to 165: A

> I agree with the learned Lord President that this appeal should be dismissed with costs. There is a string of decided cases (*ABC v. The Comptroller of Income Tax, Singapore* [1959] MLJ 162 166; *Comptroller of Income Tax v. RST* [1962] MLJ 216; *Comptroller of Income Tax v. A Co Ltd* [1966] 2 MLJ 282 284; *Comptroller of Income Tax v. AB and Comptroller of Income Tax v. CD Ltd* [1967] 1 MLJ 11; *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd* [1973] 2 MLJ 163 at 165 [1969] 2 MLJ 98; *Government of Malaysia v. DC* [1973] 1 MLJ 161 and *Comptroller-General of Inland Revenue v. NP* [1973] 1 MLJ 165) in which it has been held that the effect of the relevant provisions of the Income Tax Act, 1967 is that *on the service of a notice of assessment on the person assessed the tax payable under the assessment becomes due and payable* at the place specified in the notice, whether or not the person appeals against the assessment, *and can then be recovered by the Government by civil proceedings as a debt due to the Government. On such civil proceedings being brought by the Government, the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased*. B C D

> In *Comptroller of Income Tax v. RST* [1962] MLJ 216 Tan Ah Tah J. said at page 217:

> > It was contended by counsel for the defendant that certain triable issues had been raised and that therefore the defendant should have been given leave to defend this action. *One of these issues was said to be whether or not the sums on which tax is now claimed represent chargeable income which is taxable or capital assets not subject to taxation. On this point it is sufficient to say that it is eminently a matter for the determination of the Board of Review* which was constituted under the Income Tax Ordinance to determine, *inter alia*, questions of that very nature. E F

> In *Comptroller of Income Tax v. A Co Ltd* [1966] 2 MLJ 282 284 Choor Singh J. summed up the law in such lucid terms that I need no more than echo the following words of His Lordship with which I respectfully agree: G

> > In my opinion, *once the Comptroller of Income Tax has made an assessment and issued a notice of assessment to a taxpayer calling upon him to pay the tax mentioned in the notice, the taxpayer is bound by law to pay* such tax within one month even though he may be dissatisfied with the assessment. *Whether the assessment is right or wrong, the tax must be paid notwithstanding any objection or appeal*. The scheme of the Income Tax Ordinance is that if any person disputes the assessment, he may apply to the comptroller to review and revise the assessment made upon him. If the comptroller refuses to amend the assessment, the aggrieved taxpayer may appeal to the Board of Review appointed under s. 78 of the Ordinance and the board may, after hearing the appeal, confirm, reduce, increase or annul the assessment or make such order thereon as to it may seem fit. The taxpayer or the comptroller may then appeal to the High Court from the decision of the board upon any question of H I

A law or mixed law and fact. *A taxpayer has no right to by-pass the Board of Review and take his complaint direct to court. And when the Comptroller of Income Tax sues a taxpayer to recover tax due under a notice of assessment, the taxpayer cannot be heard to say that the assessment on which tax has been levied was not made in accordance with the provisions of the Ordinance. Such a complaint must in the first instance be laid before the*
B *Board of Review*. The provisions of Order XIV of the Rules of the Supreme Court must be read together with the provisions of the Income Tax Ordinance. *If this is not done every unwilling taxpayer will refuse to pay tax and when sued in court, will challenge the merits of the assessment, thus causing considerable delay in the collection of the tax. The*
C *proper course for every aggrieved taxpayer is to pay his tax and present his arguments against the assessment made upon him before the Board of Review*.

In place of a Board of Review we now have the Special Commissioners of Income Tax. It is open to a taxpayer to go before them and prove that he is not liable to assessment. The doors of justice are not shut to him merely because the
D claimant is the Government, but *he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner*. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.

E (emphasis added)

[35] From *Arumugam Pillai v. Government Of Malaysia* [1975] 1 LNS 2; [1975] 2 MLJ 29 (FC), I learnt these principles:

(i) By virtue of sub-s. 106(3) of the Act, the tax claim court's sole function
F is to grant judgment in favour of the LHDN. (Even a constitutional issue was rejected by the Federal Court).

(ii) As the method of recovery in tax claim proceedings in court is laid down by the law (the Act), it cannot be challenged. Particularly when the law provides for appeals against the tax assessment to the Special
G Commissioners.

[36] The Federal Court in *Arumugam Pillai* (*supra*) propounded: at pp. 29 to 30:

In granting the plaintiff's application, the learned judge rejected the defendant's objections to the application, holding that in respect of those
H objections, even if he reneged from his previous decision in *Government of Malaysia v. DC* [1973] 1 MLJ 161 and *Comptroller of Inland Revenue v. NP* [1973] 1 MLJ 165, he would nevertheless be bound by the decision of this court in *Sun Man Tobacco Co Ltd v. Government of Malaysia* [1973] 2 MLJ 163 which upheld the view that *by reason of the operation of s. 106(3) of the Income Tax Act, 1967, the court, to put it bluntly, had only one function to perform,*
I *and that was to give judgment in favour of the Government*.

Mr. Chandra, who appeared for the defendant, conceded that in respect of the objections in the defence as regards incorrect assessment or premature assessment, the learned judge was bound by *Sun Man*'s case but he contended that he had raised a constitutional issue in paragraph 10 of the defence as follows:

> The action of the plaintiff is inconsistent with Article 13(1) of the Constitution and further avers that the plaintiff has been acting under executive powers and as such the proceedings by the plantiff is *ultra vires* the Constitution of Malaysia.

Article 13(1) of the Constitution provides that "no person shall be deprived of property save in accordance with the law". On this constitutional issue, the learned judge said in his grounds of decision that he had in a previous judgment followed the decision of the Supreme Court of Burma in *Tinsa Maw Naing v. Commissioner of Police Rangoon & Anor* [1950] Burma Law Reports 17 on the construction of "in accordance with law" and held that "when the Constitution speaks of law, it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature." In the learned judge's view, there could be no doubt that income tax was deprivation of property in accordance with the law and that the Income Tax Act, 1967 was duly enacted by the legislature, so that taxing could not be said to be inconsistent with the Constitution.

...

The learned judge concluded that to attack the assessment on the constitutional issue was to say basically that the assessment was "excessive, incorrectly assessed, under appeal or incorrectly increased" which would be caught by s. 106(3) of the Act. In the result, he dismissed the objection on the constitutional issue and granted the application to sign final judgment.

...

The arguments before us in support of this appeal are not very different from the objections which were raised before the learned trial judge to the granting [1975] 2 MLJ 29 at 30 of leave to sign final judgment. It is said that the learned judge ought to have held that there was a triable issue in this case and given unconditional leave to defend. It is further said that the learned judge ought not to have acceded to the application to sign final judgment, as the appellant had shown a good defence on the merits. It is next said that the procedure under O. 14 of the Rules of the Supreme Court for leave to sign final judgment could not be applied here, as the amounts claimed by the plaintiff were not final and conclusive.

I do not think there is any merit in any of the above arguments. To my mind, the learned judge did not err in law in holding that s. 106(3) of the Income Tax Act, 1967 prevented him from entertaining the defence set up by the appellant. In this connection I need say no more than to reiterate what I said in *Sun Man*'s case, namely, that there is a string of decided cases in which it has been held *that the effect of the relevant provisions of the Income Tax Act is that on the service of a notice of assessment on the person assessed*

A *the tax payable under the assessment becomes due and payable* at the place specified in the notice, whether or not the person appeals against the assessment, *which can then be recovered by the Government by civil proceedings as a debt due to the Government,* and that *on such civil proceedings being brought by the Government the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or* B *incorrectly increased. Nothing which has been said by learned counsel for the appellant in this appeal would justify my entertaining any doubt as to the correctness of what I said in that case*.

... So long as the method of recovery is laid down by the law, I do not see how it can be challenged. Indeed, the law does provide for an appeal against taxation to C *a separate tribunal from which there is further right of appeal to the High Court* by way of a case stated.

(emphasis added)

[37] The Supreme Court case of *Chong Woo Yit v. Government Of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9; [1989] 1 MLJ 473 (SC); [1989] D AMTC 1436, propounded the principle that in a tax claim, the normal O. 14 factors (triable issues and some other reason to warrant a trial) do not apply. This case also reinforced the principle that when the LHDN brings a tax claim against taxpayers, the presiding court has no power to consider the issues that the tax sought to be recovered is excessive, incorrectly E assessed, under appeal or incorrectly increased.

[38] The Supreme Court in *Chong Woo Yit* (*supra*) enunciated it like this: at: at p. 13 (CLJ); p. 475 (MLJ):

Senior Federal Counsel also referred us to the High Court case of F *Government of Malaysia v. Abdul Rahman* [1975] 1 MLJ 276. In that case the taxpayer had been assessed to pay income tax and an additional income tax for certain years. On his failure to pay the amount claimed, the Government of Malaysia instituted a suit against him and applied for leave to enter final judgment. The assistant registrar gave leave to the Revenue and the taxpayer appealed. The appeal was dismissed on the G grounds that *the court could not entertain any plea that the tax or additional tax was not correctly assessed and therefore leave to sign final judgment was confirmed*. We would agree and approve the following *dictum* of Arulanandom J (as he then was) in that case when he said:

> *When proceedings are commenced under O 14 the normal rules for triable* H *issues do not apply to cases of this nature because of the provisions of the Income Tax Act*. Normally when the defence raises triable issues it is a rule of law that unconditional leave to defend should be given but *under s 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the government under s 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the government the court* I *shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased* under s 103(4) or (5).

(emphasis added)

[39] From *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161; [1995] 2 MLJ 119; [1995] 2 AMR 1465 (FC), I learnt the following principles: A

(i) The Special Commissioners are the finders and judges of the facts.

(ii) The Special Commissioners have the power to consider issues of limitation, excessive tax, incorrect assessment or incorrect increase, while the courts are prohibited by sub-s. 106(3) from entertaining these issues. B

[40] The Federal Court in *Dato' Hj Ghani Gilong* (*supra*) propounded: at p. 168 (CLJ); pp. 127 and 128 (MLJ): C

> *In our view, the High Court has no power to entertain a plea of limitation under s 91(1) and (3) of the Act advanced by a taxpayer. However, the special commissioners have such power*. Our reasons for these conclusions now follow.
>
> *If counsel for the taxpayer were correct in his contention that the plea of limitation based on s 91(1) and (3) of the Act is available to him in proceedings for recovery of tax brought in court as well as in proceedings before the special commissioners, then a decision by the High Court on the question of limitation would prevent the special commissioners from deciding the same question as they would regard themselves as bound by the decision of the High Court, thereby abdicating their fact-finding function of determining whether there has been fraud or wilful default within the meaning of s 91(3a) of the Act*. Alternatively, even if the special commissioners do not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the special commissioners on the identical question of limitation. These would not be reasonable results and, what is unreasonable, cannot be the law. D E F
>
> In so holding, we do not overlook the point that further appeals lie to the High Court by way of case stated on a point of law, against the decisions of the special commissioners pursuant to para 34 to Sch 5 of the Act, and thereafter, to the Federal Court. Therefore, it is perfectly possible that the plea of limitation in this case may ultimately arise for determination by this court, but this would be by way of a different route, and the powers which this court would exercise in such a situation would not be full appellate powers. This is because the object of an appeal by way of case stated is clearly to provide a limited right of appeal from the special commissioners to the High Court, in cases where a point of law is involved. The High Court would then confine itself to the point of law appearing in the case stated, and having answered it, would apply it to the facts as found by *the special commissioners, who are judges of fact*. … G H
>
> For the sake of completeness, we must add that in a situation where summary judgment has been entered against a taxpayer in proceedings by way of a suit for the recovery of tax, and the taxpayer has appealed to the special commissioners, and, if in such an appeal, a plea of limitation is successfully invoked by the taxpayer, then we are of the view that the result of such appeal before the special commissioners (unless reversed on appeal), being in conflict with the order for summary judgment, must I

override the order for summary judgment. We say so because *the special commissioners are the judges of the facts, and have the jurisdiction to consider not only a plea of limitation based on s 91(1) and (3) of the Act but also other issues such as whether the amount of tax sought to be recovered is excessive, incorrectly assessed or incorrectly increased, all of which are issues which the court in proceedings for recovery tax by suit is prohibited by s 106(3) of the Act from entertaining*.

(emphasis added)

[41] From *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235; [2009] 1 MLJ 555 (CA); [2008] 5 AMR 458, I learnt the following principles:

(i) When the LHDN sues a taxpayer in a tax claim, the taxpayer cannot say that the assessment was not made according to the provisions of the Act. The taxpayer can only assert this before the Special Commissioners.

(ii) If it were, otherwise, taxpayers will refuse to pay tax, and when they are brought to court, they will challenge the propriety of the assessment or the tax claim itself. This will cause a considerable delay in tax collection, which is undesirable.

[42] The Court of Appeal in *Ta Wu Realty* (*supra*) enunciated it this way: at pp. 240 to 249 (CLJ); pp. 563 to 570 (MLJ):

[7] Apart from lodging the relevant Form Q the appellant also made the first instalment payment as demanded by the assessment notice. It has to be clarified that *a prompt payment to the Inland Revenue is not an indulgence on the part of a taxpayer but a statutory requirement.* The law on this point is well established, as *once the Director General has made an assessment, and issued a notice of assessment to a taxpayer calling upon him to pay the tax mentioned, he must pay up that tax liability within a specific period, even though dissatisfied with that assessment. Whether the assessment is right or wrong the tax must be paid notwithstanding any objection or appeal* (*Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd* [1969] 2 MLJ 98). Any reluctance to pay that tax liability will attract a penalty imposed for late payment; under s 103(4) a penalty of 10% on the unpaid tax if remains unpaid within 30 days of receipt of the assessment and another 5% for the balance under s 103(5) if remains unpaid within 60 days. Choor Singh J in *Comptroller of Income Tax v. A Co Ltd* [1966] 2 MLJ 282 had lucidly summed up the law as regards the need to pay up, on receipt of the notice of assessment, when he observed (at p 284):

> *A taxpayer has no right to by-pass the Board of Review (an entity equivalent to the Malaysian Special Commissioners) and take his complaint direct to court. And when the Comptroller of Income Tax sues a taxpayer to recover tax due under a notice of assessment, the taxpayer cannot be heard to say that the assessment on which the tax has been levied was not made in accordance with the provisions of the ordinance*. Such a complaint must in the first instance be laid before the Board of Review. *If this is not done every unwilling taxpayer will refuse to pay tax and when sued in court will challenge the merits of the assessment, thus causing considerable*

delay in the collection of tax. The proper course for every aggrieved taxpayer is to pay his tax and present his argument against the assessment made upon him before the Board of Review.

...

[33] To satisfy our requirements, this panel had taken the additional step of scrutinising the supporting affidavit of the appellant, and conclude whether any allegation was made against the Director-General for blatantly failing to perform some statutory duty. Regretfully we failed. *The only allegation made against the Director-General was found at para 32 of the supporting affidavit, but the assertions went into the merits of the assessment, matters which could be dealt with by the Special Commissioners* or if need be, to be transmitted to the High Court.

[34] To wind up the matter, *with there being a presumption that the administration exercises its powers in good faith and for public benefit, what with the learned judge having found no failure of performance of some statutory duty, followed by learned counsel for the appellant submitting outside the periphery of his pleadings*, compounded further by the fact that the pleaded ground has no place in a judicial review application, *it was no surprise that the learned judge had dismissed this application*.

(emphasis added)

[43] I am further guided by the judgment of the High Court in *Government Of Malaysia v. Mohd Najib Hj Abd Razak* [2020] 1 LNS 754; [2020] 12 MLJ 580 (HC), which:

(i) applied the established principle in our tax law that in an application for summary judgment, the usual O. 14 consideration of raising triable issues to defeat the application, is not applicable;

(ii) reinforced our tax regime's operative principle that taxpayers must first pay the tax assessed, and then lodge their challenges against the merits of the assessments with the Special Commissioners to determine. And if the taxpayers do not first pay the tax assessed, the LHDN will bring a tax claim in the courts to recover the tax assessed, as a debt due. Then, the limited role of the courts is to grant judgment to the LHDN; and

(iii) reinforces the principle that issues relating to the merits of the assessment and issues about limitation are issues of fact. All factual issues have to be brought before the Special Commissioners, and not the courts.

[44] The applicable passages of the reasoning of His Lordship Ahmad Bache J in *Mohd Najib* (*supra*) are:

[3] It is pertinent to note that *under the tax recovery system of this country*, as provided for under the ITA 1967, *when the proceedings are commenced under O 14 of the ROC 2012, the trite legal principle namely that the defendant has to raise triable issues in order to avoid a summary judgment being entered, does not operate*.

A [4] Such is the law, is because of *the principle of revenue law that when there is a debt due to the government the court shall not entertain any plea whatsoever. This has been expounded in several high authorities*, *viz*, the Supreme Court in the case of *Chong Woo Yit v. Government of Malaysia* [2020] 12 MLJ 580 at 5851 MLJ 473; [1989] 1 CLJ (Rep) 9 which affirmed the principle enunciated in the case of *Government of Malaysia v. Abdul Rahman* [1975] 1 MLJ 276 that:

> When proceedings are commenced under O 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when defence raised triable issues it is a rule of law that unconditional leave to defend should be given but under s 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the government under s 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5).

...

[24] This necessarily means, on a plain reading, that *once the defendant was served with a notice of assessment, the court in a civil proceeding brought by the government, has no power to entertain any plea that the amount is excessive, incorrectly assessed, under appeal or whatsoever*, unlike the Special Commissioners of Income Tax who are the judges of facts.

...

[39] Thereafter, sub-s (3) to s 106 of the ITA 1967 is triggered, as envisaged in the many authorities to which have been referred to by this court earlier whereby, firstly, the court cannot entertain any plea regarding the amount of tax sought to be recovered on the ground that they are excessive incorrectly assessed, or calculated, or incorrectly assessed, under ss 103(4) or (5) of the ITA 1967 as asserted by the defendant. *In accordance with decision of the Federal Court in Arumugan Pillai, the ITA 1967 permits the court not to entertain any defences or plea set up by the defendant. The provision as expressed by the Federal Court 'pay first talk later' even though harsh, but is an intentional provision of the Legislature because of the high incidence of tax evasion in this country*.

...

[63] *It is germane to note on the issues of fraud/wilful/default/negligence under s 91(3) of the ITA 1967 and on limitation period, they are all issues of facts. This court opines that such issues are to be decided by the SCIT being judges of facts*. Referring to the case *Kerajaan Malaysia v. Dato' Haji Ghani Gilong* [1995] 2 MLJ 119; [1995] 3 CLJ 161 the Federal Court has said:

> In our view, the High Court has no power to entertain a plea of limitation under sub-ss 1 and 3 of s 91 of the Act advanced by a taxpayer. However, the Special Commissioners have such power.
>
> ...

[64] Hence, this court holds that the plaintiff has no obligation to plead fraud, wilful default or negligence by the defendant in the statement of claim under s 91(3) of the Income Tax Act 1967 since these are issues not within the power of this court to decide. It is clear from the above decision that *the SCIT is conferred with the jurisdiction to hear issues on the limitation period, and any other questions which involve facts*.

(emphasis added)

The Defendant's Defences

[45] The fundamental premise of an O. 14 summary judgment is that the defendant has no defence to this tax claim: O. 14 r. 1(1) of the Rules of Court 2012.

[46] From the material facts pleaded in the defendant's defence and the averments made in the affidavit in reply (which he did not affirm, but which his US attorney affirmed on his behalf), I gathered that the defendant mounts nine defences against this tax claim. I will discuss these nine defences in sequence below.

[47] In his defence, the defendant also pleads other facts, but I do not consider them defences. For instance, the defendant pleads that he "did not have any bank accounts in Malaysia during the years of assessment 2013 and 2014". I do not consider this averment a defence to the tax claim.

[48] To my mind, the defendant does not need to have a bank account in Malaysia to be obligated to pay tax. In other words, not having a bank account in Malaysia is not a defence to a tax claim.

[49] The other instance is that the defendant pleads that he "did not conduct business in Malaysia during the years of assessment 2013 and 2014".

[50] Similarly, the defendant does not need to conduct business in Malaysia to be obligated to pay tax. Put differently, not conducting business in Malaysia is not a defence to this tax claim.

[51] I am of the view that I do not need to consider these two averments above as part of the defendant's defences.

[52] Additionally, the defendant raises an issue that he asserts is the "some other reason" that warrants a trial of this tax claim – the expression used in O. 14 r. 3(1). This issue is about the 1MDB Suit 330. I will discuss this argument in turn below.

The Defences Gleaned From The Defence And The Affidavit In Reply

First Defence: Issue Of Limitation

[53] The defendant argues that:

(i) The 2013 and 2014 "assessments" referred to in the statement of claim are "void, illegal or invalid" because they were made more than five

A years after the years of assessment, without complying with sub-s. 91(3) of the Act.

(ii) Subsection 91(3) provides that there is no applicable limitation period to make the tax assessment if the LHDN decides that the taxpayer committed some form of fraud, or wilful default, or negligence. The
B defendant argues that to invoke the operation of sub-s. 91(3), the LHDN must first plead fraud, wilful default or negligence. The defendant asserts that since the LHDN did not plead fraud, wilful default or negligence, this is a defence to the tax claim and summary judgment should not be given.

C

[54] My judgment on this issue and my reasons are as follows. As I have set out above, the Federal Court case of *Dato' Hj Ghani Gilong* (*supra*) held that the issue of limitation is for the Special Commissioners, not for the courts, to decide. I am bound to follow this Federal Court precedent.

D **[55]** And, it is up to the Special Commissioners to make the findings of fact relating to the issue of limitation.

[56] It is also up to the Special Commissioners, if there is a proceeding before them, to determine whether there was fraud, wilful default or negligence on the part of the defendant in relation to tax.

E

[57] I find that this issue is not a triable issue that defeats the LHDN's application for summary judgment.

Second Defence: The LHDN Did Not Plead The Basis For The Assessments And Hence Fails To Set Out A Cause Of Action

F **[58]** The defendant argues that the LHDN did not plead the basis for the tax assessments and therefore fails to disclose a cause of action against the defendant.

[59] My judgment on this issue and my reasons are as follows. This argument is unsustainable. The basis for the LHDN's statutory tax claim is
G that the notices of assessment to pay tax (based on statute: the Act), were issued to the defendant (based the Act), and the defendant did not pay. The LHDN then filed this tax claim to recover the tax amount as a debt due to the Government (again based on the Act).

H **[60]** I find that the LHDN adequately pleaded the material facts to support its statutory cause of action to recover the tax amount assessed, as a debt due and payable.

[61] I am also bound by the authority of *Chong Woo Yit* (*supra*), which held that once the notices of assessment are served on the defendant, the tax is
I payable: sub-s. 103(2) of the Act. And any tax that is due and payable are recoverable through a tax claim proceeding, as a debt due: sub-s. 106(1) of the Act. Also, the s. 142 certificate constitutes the conclusive evidence that the tax amount stated in it is due: sub-s. 142(1) of the Act.

[62] I find that this issue is not a triable issue that defeats the LHDN's application to enter summary judgment. A

Third Defence: The LHDN Issued The Assessments Without Complying With The "Jurisdictional Threshold Requirements" In The Act

[63] The defendant submits that the LHDN issued the assessments without complying with the "jurisdictional threshold requirements" in the Act, which have to be complied with before the assessments can be issued. B

[64] My judgment on this issue is this. It is unclear as to what specifically are the "jurisdictional threshold requirements" that the defendant alludes to. But it is clear that this assertion is a challenge against the legality of the assessments. C

[65] I hold that it is not open to the defendant to raise this issue of legality as a triable issue in an O. 14 proceeding of a statutory tax claim. For this principle, I rely on and apply the Federal Court authority of *Kerajaan Malaysia v. Mudek Sdn Bhd* [2017] 10 CLJ 158; [2017] 5 MLJ 133 (FC); [2017] 6 AMR 739. D

[66] *Mudek* (*supra*) is a case on the Real Property Gains Tax Act 1976 (RPGT Act), but it is squarely applicable here because sub-s. 23(3) of the RPGT Act is the equivalent of sub-s. 106(3) of the Act. E

[67] The Federal Court summarised the principle as follows: at pp. 165 to 166 (CLJ); p. 140 (MLJ):

> [14] In the upshot:
>
> (i) if a notice of assessment is raised, and **if a tax payer wishes to raise issues pertaining** to the amount, the correctness or **the legality of the assessment raised**, the tax payer should invoke s 18 of the said Act. If this is resolved in the tax payer's favour then whatever tax paid can be refunded as an over payment pursuant to s 24 of the said Act; and F
>
> **(ii) if the tax payer fails to do so, then these issues cannot be raised as triable issues in an application for summary judgment by virtue of s 23(3) of the said Act**. G
>
> (emphasis added)

[68] Further, in a tax claim for the recovery of tax, the taxpayer cannot say to the presiding court that the assessment was not made in accordance with the provisions of the Act: *Ta Wu Realty* (*supra*). H

[69] I similarly rely on and apply *Ta Wu Realty* (*supra*).

[70] I find that this issue is not a triable issue that defeats the LHDN's application for summary judgment. I

A Fourth Defence: The Notices Of Assessment Were Sent To An Address Which Is No Longer The Defendant's Residential Address

[71] The defendant avers that the notices of assessment were sent to an address which is no longer the defendant's residential address and raises this as a defence.

B

[72] My judgment on this issue and my reasons are as follows. Under the Act, the LHDN does not have the obligation to serve the notices of assessment on the defendant at his then-current residential address.

[73] Section 145 provides for the service of notices under the Act.
C Subsections 145(1) and 145(2)(c) are applicable. The LHDN served the notices of assessment on the defendant by registered post. The notices of assessment sent by registered post are deemed properly served on the defendant, for the purposes of the Act, if they were sent to the defendant's last known address.

D **[74]** The LHDN averred that it sent the notices of assessment to the defendant's last known address that was known to the LHDN at the time. There is no reason to doubt that the address that the LHDN used was the defendant's last known address. And the defendant presents no evidence to substantiate that the address that was used was not the defendant's last known
E address.

[75] In any event, the defendant does not deny receiving the notices of assessment.

[76] I find that this is not a defence or a triable issue that defeats the
F LHDN's application for summary judgment.

Fifth Defence: The Defendant Was A Non-resident Individual And Malaysia Was Not His Country Of Residence

[77] The defendant raises the issue and avers that he was a non-resident individual and Malaysia was not his country of residence in 2013 and 2014.

G

[78] My judgment on this issue and my reasons are as follows. Section 3 provides that income tax is chargeable on the defendant's income "accruing in or derived from Malaysia", or "received in Malaysia" even if it comes from abroad. The defendant's residency or country of residency matters not.
H Whether the defendant was a resident here in Malaysia, or whether Malaysia was his country of residence, are not relevant issues to his obligation to pay tax to the LHDN.

[79] This issue of residency should be argued before the Special Commissioners, who are the judges of the facts surrounding this tax claim.

I **[80]** If the defendant argues that he should not have to pay any tax because he was not resident in Malaysia at the relevant time, sub-s. 106(3) captures the complaint under the "incorrectly assessed" category and dictates that this court does not entertain his complaint.

[81] I find that this issue is not a triable issue that defeats the LHDN's application to sign summary judgment.

Sixth Defence: The Defendant Informed The LHDN That "He Would Be Moving Out Of Malaysia To Work Abroad For The Long Term" And That He Would "No Longer Be A Malaysian Tax Resident"

[82] The defendant avers that by his letter dated 10 August 2011, he "duly informed the [LHDN] that he would be moving out of Malaysia to work abroad for the long term, he hoped that the LHDN could issue a tax clearance letter until the year of assessment 2011 and confirm that he had no arrears in tax". There was no statement that he would "no longer be a Malaysian tax resident".

[83] I reproduce here the defendant's letter dated 10 August 2011 to the LHDN:

Tarikh : 10 AUG 2011

Ketua Pengarah
Lembaga Hasil Dalam Negeri,
Cawangan Kuala Lumpur Bandar
Tingkat UG, 6,9,10,11, 20 &21
Wisma KWSG, Jalan Kampung Attap
50460 Kuala Lumpur.

CAWANGAN KUALA LUMPUR BANDAR
Unit Khidmat Pelanggan
11 AUG 2011
LHDNM

Tuan,

LOW TAEK JHO (SG 20555460010)
TAHUN TAKSIRAN 2011

Merujuk kepada perkara diatas, saya ingin mengemukakan borang-borang berikut untuk tahun taksiran 2011 yang telah lengkap dan ditandatangani untuk perhatian pihak tuan:

1. Borang BE untuk tahun taksiran 2011;
2. Borang CP21 untuk tahun taksiran 2011;

Memandangkan saya akan bekerja di luar negeri untuk jangka masa yang panjang, saya berharap pihak tuan dapat mengeluarkan surat penyelesaian cukai ("tax clearance letter") sehingga tahun taksiran 2011 and mengesahkan bahawa saya tiada hal-hal cukai tertunggak dengan pihak tuan secepat mungkin.

Kerjasama dan tindakan segera pihak tuan dalam perkara ini amat saya hargai.

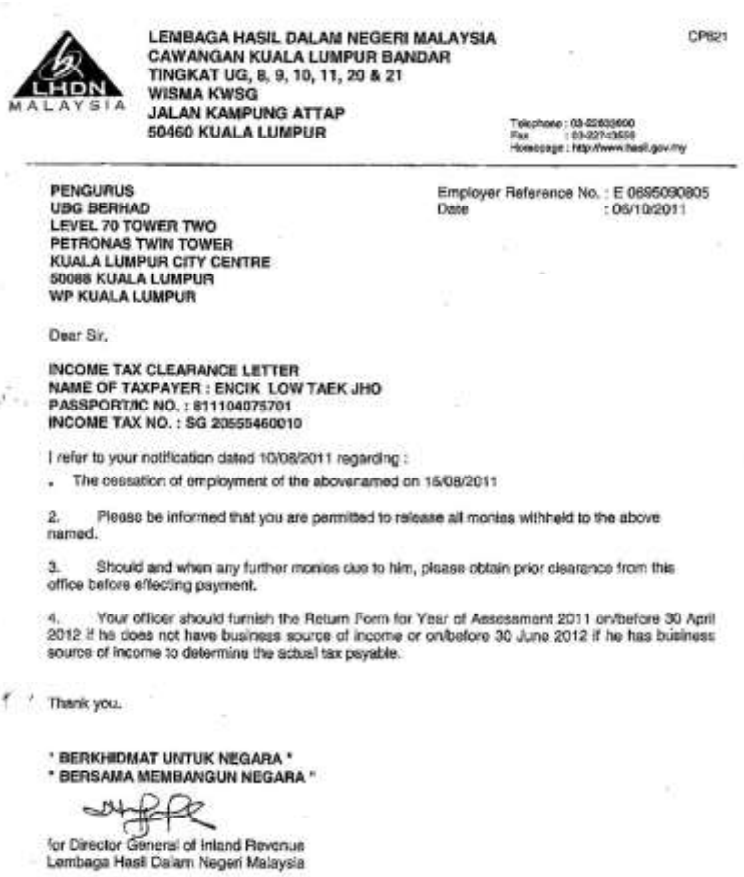
Sekian, terima kasih.

Yang benar,

Low Taek Jho

[84] The LHDN responded to the defendant's letter of 10 August 2011 by writing to the defendant's employer at the time: UBG Berhad. The LHDN's letter dated 6 October 2011 acknowledged the defendant's cessation of employment and informed UBG Berhad that they were permitted to release to him certain monies (probably his remuneration net-of-tax).

[85] This LHDN's letter dated 6 October 2011 to UBG Berhad is produced here:



LEMBAGA HASIL DALAM NEGERI MALAYSIA
CAWANGAN KUALA LUMPUR BANDAR
TINGKAT UG, 8, 9, 10, 11, 20 & 21
WISMA KWSG
JALAN KAMPUNG ATTAP
50460 KUALA LUMPUR

CP621

Telephone : 03-26939600
Fax : 03-2274 3508
Homepage : http://www.hasil.gov.my

PENGURUS
UBG BERHAD
LEVEL 70 TOWER TWO
PETRONAS TWIN TOWER
KUALA LUMPUR CITY CENTRE
50088 KUALA LUMPUR
WP KUALA LUMPUR

Employer Reference No. : E 0695090805
Date : 06/10/2011

Dear Sir,

INCOME TAX CLEARANCE LETTER
NAME OF TAXPAYER : ENCIK LOW TAEK JHO
PASSPORT/IC NO. : 811104075701
INCOME TAX NO. : SG 20555460010

I refer to your notification dated 10/08/2011 regarding :

- The cessation of employment of the abovenamed on 15/08/2011

2. Please be informed that you are permitted to release all monies withheld to the above named.

3. Should and when any further monies due to him, please obtain prior clearance from this office before effecting payment.

4. Your officer should furnish the Return Form for Year of Assessment 2011 on/before 30 April 2012 if he does not have business source of income or on/before 30 June 2012 if he has business source of income to determine the actual tax payable.

Thank you.

" BERKHIDMAT UNTUK NEGARA "
" BERSAMA MEMBANGUN NEGARA "

for Director General of Inland Revenue
Lembaga Hasil Dalam Negeri Malaysia

[86] These letters – the defendant's letter of 10 August 2011 and the LHDN's letter of 6 October 2011 – concern the defendant's tax for either the years of assessment 2010 or 2011. But the years of assessment relevant to this tax claim is 2013 and 2014.

[87] The defendant's argument here is, with respect, off-the-mark.

[88] I find that this is not a triable issue that defeats the LHDN's application for summary judgment.

Seventh Defence: The Amounts Stated In The Statement Of Claim For 2013 And 2014 Are Not Income Accrued In Nor Income Derived From Malaysia

[89] The defendant contends that the amounts stated in the statement of claim as chargeable income for 2013 and 2014 are not income accrued in or income derived from Malaysia.

[90] My judgment on this issue and my reasons are as follows. This is the source-of-income issue. As this is a statutory tax claim for the recovery of a debt, the source-of-income issue must be dealt with by the Special Commissioners, not by the court: *Chong Woo Yit* (*supra*).

[91] In any event, sub-s. 97(1) also gives an answer to this issue. If a taxpayer does not lodge an appeal against the assessment, the assessment becomes "final and conclusive" for purposes of the Act, which means for the purposes of this tax claim.

Eighth Defence: The LHDN Did Not Plead Whether The Assessments Were Issued Under Sections 90(3), 91, 91A, 92 Or 96 Of The Act

[92] The defendant argues that the LHDN has failed to establish the bases for the assessments by not specifying whether the assessments were issued under ss. 90(3), 91, 91A, 92 or 96 of the Act.

[93] My judgment on this issue and my reasons are here. I find that this issue is untenable. First, there is no requirement for the LHDN to specify under which provision the assessments were issued.

[94] Second, in any event, I perused the LHDN's statement of claim and found that the LHDN had in fact specified that the notices of assessment were issued under sub-s. 90(3) of the Act: para. 4 of the statement of claim.

[95] A similar averment that the notices of assessment were issued under sub-s. 90(3) of the Act can also be found in para. 8 of the LHDN's affidavit in support of the application for summary judgment.

[96] And third, it is not necessary for the LHDN to plead the provisions of the Act under which the assessments were issued, as long as the LHDN pleads the material facts necessary to bring the LHDN within the scope of the Act: *Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd* [2018] 9 CLJ 184; [2018] 3 MLJ 749 (CA).

[97] The Court of Appeal in *Karun Klasik* (*supra*) had this to say on the issue: at p. 214 (CLJ); pp. 782 to 783 (MLJ):

> [104] Even if the pleading of these statutory provisions is thought to be essential, it ought to be borne in mind that *O 18 r 7 requires that all material facts necessary to support a claim are to be pleaded. If a party's case is premised on a statue [sic], then it is incumbent upon that party to plead all material facts necessary to bring itself within the ambit of that particular statute* (see *Malaysian Civil Procedure 2015*, Vol 1 published by Sweet & Maxwell). *Conversely, it would be entirely inadequate for such a party to plead a particular statute but not then plead the necessary facts to fall within its ambit*. As such a court should be slow to strike out a claim for simply failing to set out a specific provision of a statute when the material facts allowing the claimant to fall within the ambit are sufficiently clear (this does not apply to matters which are required to be specifically pleaded as set out in O 18 r 8 and which

A deals with pleadings subsequent to a statement of claim for example limitation, fraud, performance and release *etc*. Nor would it be the case when the cause of action arises solely from a statute).

(emphasis added)

B **[98]** And I find that the LHDN has sufficiently pleaded the material facts to come under the Act to sustain this tax claim.

Ninth Defence: The LHDN Cannot Rely On The Section 142 Certificate

[99] The defendant argues that since there is no lawful basis for the issuance of the assessments, the LHDN cannot rely on the sub-s. 142(1) certificate.

C **[100]** My judgment on this issue and my reasons are as follows. I have held that the LHDN has established the basis for this tax claim. The basis for this tax claim is the Act. The LHDN brought itself under the provisions of the Act and founded it cause of action. Assessments were issued to the defendant. The defendant did not pay the tax assessed.

D **[101]** Subsection 142(1) contains clear terms. The certificate constitutes sufficient evidence to prove the LHDN's tax claim for the amount stated in it.

[102] The certificate is also sufficient authority for the courts to grant E judgment against the defendant for the amount.

The Defendant's "Some Other Reason" For Trial – The 1MDB Suit 330

[103] The defendant submits that there is "some other reason" that warrants a trial of this tax claim as a result of the 1MDB Suit 330 against him. He F makes three points.

First Point: By Filing This Tax Claim, But Not Disclosing Whether The Tax Amount Claimed Is Part Of The Money Claimed In Suit 330, The LHDN Has Taken Inconsistent Positions

G **[104]** The defendant placed much emphasis on the fact that 1Malaysia Development Berhad (1MDB), together with four other entities as plaintiffs, filed Kuala Lumpur High Court Suit No. WA-22NCVC-330-05-2021 (Suit 330) against the defendant together with five other individuals, as defendants. The defendant argues that:

H (i) 1MDB is wholly owned by the Government of Malaysia, through the Minister of Finance (Incorporated).

(ii) In Suit 330, the plaintiffs there plead that the defendants there (including the defendant) received approximately USD3.78 billion between 2009 and 2014. The plaintiffs assert that the USD3.78 billion does not belong I to the defendant and is held by him as a constructive trustee.

(iii) The defendant questions whether the chargeable income in this tax claim, from which the LHDN (Government of Malaysia) assessed his tax payable, is the same money as the money claimed by 1MDB in Suit 330. If it is, then the LHDN is taking an inconsistent stand – in Suit 330, 1MDB asserts that the money claimed is trust money, but in this tax claim, the Government of Malaysia asserts that the money is chargeable income from which the defendant must pay the tax assessed.

(iv) And if it is the same money, then the LHDN has taken inconsistent positions by filing this tax claim. (I take it that the "inconsistent position" alluded to is the LHDN's position as against 1MDB's position.)

(v) The defendant did not raise these facts or this issue in his defence nor in his US counsel's affidavit in reply. But the defendant submits that I can take judicial notice of Suit 330.

(vi) Further, since the defendant discloses this issue as "some other reason" to warrant a trial of this tax claim, further investigation about whether the money in Suit 330 and the money in this tax claim are the same money, is necessary. The defendant adds that this court should embark on that investigation. And so, granting summary judgment is not the right thing to do.

(vii) The defendant cites the Federal Court case of *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151; [1999] 1 MLJ 657 (FC); [1999] 2 AMR 1561, as authority on the meaning of the words "there ought for some other reason to be a trial" in O. 14 r. 3 of the Rules of Court 2012. The defendant argues that since all the evidence about whether the money claimed in Suit 330 is the same money as the tax money claimed in this statutory tax claim are in the LHDN's control, further investigation on this issue is needed. And this further investigation tantamount to "some other reason" there ought to be a trial of this tax claim.

[105] My judgment on this issue and my reasons are as follows. Even though 1MDB is owned by the Government of Malaysia, through the Minister of Finance (Incorporated), 1MDB is not the Government of Malaysia (the LHDN). 1MDB and the LHDN are different entities.

[106] In Suit 330, there are five plaintiffs. 1MDB is the first plaintiff. There are four other plaintiffs. In Suit 330, there are six defendants. The defendant here is the first defendant there. There are five other individual defendants.

[107] In Suit 330, 1MDB claims against the defendant under the causes of action of fraud, improper receipt of all five plaintiffs' monies (not just 1MDB's money), fraudulent misappropriation, unjust enrichment, and

A conspiracy to injure or defraud. In this tax claim, however, the LHDN sues the defendant for not paying his assessed tax, under the statutory regime governed by the Act. The respective causes of action are distinct and unrelated, and they arose out of 1MDB and the LHDN each exercising different rights as plaintiffs.

B **[108]** The monies claimed in Suit 330 are unrelated to this statutory claim for tax as a debt due to the LHDN.

[109] I hold that there is no good reason for me to embark on an "investigation" to determine whether the money claimed in Suit 330 is the same money as the tax money claimed here.

C

[110] I find that the defendant's argument on this issue to be speculative, remote and unsustainable.

[111] In any event, the defendant did not plead, in his defence, the material facts that may give rise to this issue. And hence this issue cannot be an issue to be tried in this tax claim.

D

[112] Apart from the defendant saying so in his written submissions and his counsel's oral submissions, there is no evidence that points to, or compels an inference that there is a connection between the money claimed in Suit 330 and the defendant's chargeable income in this tax claim.

E

[113] The defendant presents no evidence nor condescends to particulars that the money claimed in Suit 330 is the same money as the chargeable income in this tax claim. As such, the defendant's argument – and I am compelled to refer to it as an "argument" rather than an "averment", as it is not contained in either his defence or the affidavit in reply that was filed on his behalf – remains a bare allegation.

F

[114] The defendant argues that since the documentary evidence is in the LHDN's possession and control, the defendant should be allowed to file for interrogatories and the discovery of documents.

G **[115]** But the defendant did not file for interrogatories and discovery. This tax claim was filed in January 2021. This application for summary judgment was filed in April 2021. Suit 330 was filed in May 2021. Between May 2021, when Suit 330 was filed, and the first hearing of this application on 22 August 2022, the defendant could have filed for interrogatories and discovery. But he did not.

H

[116] I also comprehend that this argument is actually a challenge against the basis of the tax assessment. It is a challenge against the propriety or correctness of the LHDN's assessment. It is well-established that any challenge against the merits of the tax assessment cannot be done in this tax claim. Such challenges are to be raised with the Special Commissioners for

I

their decision. The Special Commissioners are the judges of the facts in dispute: sub-s. 106(3) of the Act and (i) *Sun Man Tobacco Co Ltd v. Government Of Malaysia* [1973] 1 LNS 144; [1973] 2 MLJ 163 (FC); (ii) *Chong Woo Yit v. Government Of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9; [1989] 1 MLJ 473 (SC); [1989] AMTC 1436; (iii) *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161; [1995] 2 MLJ 119 (FC); (iv) *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235; [2009] 1 MLJ 555 (CA).

[117] Further, if I were to accept this argument as a triable issue, or as "some other reason" that warrants a trial – then for taxpayers who have disputes with the Government of Malaysia, or a Government body, or a Government-linked entity – all that these taxpayers have to do to avoid summary judgment in a tax claim against them is to assert that they are suing the Government or the Government is suing them. They can assert that the money claims in their suits with the Government are the same money as the tax money that the LHDN is claiming from them. I am not inclined to allow this circumstance to be the effect of my decision on this issue.

[118] Furthermore, and more significantly, if I were to accept this argument as a triable issue, or as "some other reason" that warrants a trial of this tax claim, the other five defendants in Suit 330 will use this very ground to deflect paying their taxes to the LHDN. They can challenge their respective tax assessments. And they will have precedent to challenge the LHDN's tax claim in court proceedings (instead of raising the challenge with the Special Commissioners).

[119] As for the Federal Court authority of *United Merchant Finance* (*supra*), I am of the view that the *ratio decidendi* of the case is that if a defendant in an O. 14 proceeding cannot raise a triable issue, the defendant can still satisfy the presiding court that there ought to be a trial "for some other reason". But the presiding court must be so satisfied. And the Federal Court adopted the view that the "some other reason" is actually "justice" *ie*, to do justice.

[120] I refer to these passages in *United Merchant Finance* (*supra*), citing with approval the reasoning of Megarry J in *Miles v. Bull* [1968] 3 All ER 632; [1968] 3 WLR 1090; [1969] 1 QB 258, at 163 to 164 (CLJ); pp. 666-667 (MLJ):

> Our O 14 r 3 is in *pari materia* with the English RSC 1965, O 14 r 3. There are several authorities which considered the scope of the words 'some other reason to be a trial'. In *Miles v.nm , Bull* [1968] 3 All ER 632, the defendant and her husband had separated, but the former was in occupation of the matrimonial home which was sold by the husband to the plaintiff. The plaintiff then brought an action claiming possession of the property and applied for summary judgment. The master gave the defendant unconditional leave to defend. The plaintiff's appeal was

dismissed. Megarry J found that nearly all the relevant facts were under the control of the plaintiff and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those facts which would assist her (the defendant). His Lordship reasoned that *if the defendant could not point to a specific issue which ought to be tried, but nevertheless satisfied the court that there were circumstances that ought to be investigated, then the words 'there ought for some reason to be a trial' would be invoked*.

At pp 637 to 638, His Lordship explained:

> Under r 3 and r 4 of the present RSC, O 14, *the defendant can obtain leave to defend if (and I read (13) from r 3(1)) the defendant satisfies the court 'that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial'*. These last words seem to me to be very wide. They also seem to me to have special significance where (as here) most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possibleat a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff. In the present case the plaintiff's evidence initially consisted of a single affidavit in which brevity could scarcely be carried further. He has now amplified this by further evidence, but this is certainly not exhaustive or conclusive. The words 'there ought for some other reason to be a trial' seem to me to give the court adequate powers to confine RSC, O 14, to being a good servant and prevent it from being a bad master. If I may adapt the language of Lord Parker of Waddington in *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916-17] All ER Rep 191 at p 208; [1916] 2 AC 307 at p 346; referred to in the notes to RSC, O 14, in The Supreme Court Practice 1967 (see p 122), if the circumstances of the case are 'such as to require close investigation', this will 'preclude the propriety of giving leave to sign judgment under O 14 r 1'. The question is thus whether this is such a case.
>
> I think it is. *In my judgment 'there ought for some other reason to be a trial'; and the reason is that of justice. By carrying through a transaction at unusual speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant from her home. The husband has whatever rights the law gives him, and so has the plaintiff; but in the circumstances of the case I do not think it would be just if the plaintiff were able to enforce the rights that he claims without being put to strict proof that they do enable him to evict the defendant*. I was told that in granting leave to defend Master Jacob said that the case was 'too near the bone for O 14'. That, if I may say so, seems to me to summarise admirably what I have tried to express in greater

detail. *RSC Ord 14, is for the plain and straight-forward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision*.

(emphasis added)

[121] I acknowledge and I apply the principle that even if the defendant here does not raise a triable issue, I must nevertheless consider whether there is "some other reason" that warrants a trial of this tax claim.

[122] I bear in mind: (i) that this is a straightforward statutory tax claim; (ii) that the defendant did not submit tax returns for the relevant years; (iii) that the LHDN issued assessments to him, which he did not respond to; (iv) that he did not challenge the service of the assessments; (v) that he failed to pay the total tax amount assessed; (vi) that the 10% tax increase is mandated by the Act (per sub-s. 103(5)); (vii) that he did not appeal to the Special Commissioners about the merits of the assessment; (viii) that the LHDN issued the s. 142 certificate to support this tax claim; (ix) the stringency, but clarity, of the provisions of the Act, which governs our tax regime; (x) the binding case law authorities on the principles that I am bound to follow when considering an application for summary judgment in a tax claim; and (xi) that the defendant now raises these facts or issues or reasons that, to me, essentially go to the correctness or propriety of the assessment and of this tax claim (which I am not to consider: per sub-s. 106(3) and the case law on this issue).

[123] I am not satisfied that the fact that Suit 330 is brought against the defendant, coupled with the argument that with "further investigation", I might find that the money claimed in Suit 330 may be the same money as the tax money in this tax claim, or that I might find that the LHDN has committed an abuse of the court process by bringing this tax claim – create a circumstance that there is "some other reason" to warrant a trial.

Second Point: By Filing This Tax Claim, But Not Disclosing Whether The Tax Amount Claimed Is Part Of The Money Claimed In Suit 330, The LHDN Has Committed An Abuse Of Process

[124] On this point, the defendant argues it like this:

(i) By filing this statutory tax claim, but not disclosing whether the tax money claimed is part of the money claimed in Suit 330, the LHDN has committed an abuse of the process of the court.

(ii) Under the Act, when a taxpayer wants to challenge a tax assessment, the taxpayer lodges an appeal to the Special Commissioners. The defendant argues that the Special Commissioners have no power to investigate whether the LHDN has committed an abuse of process. Their powers are limited only to the merits of the assessment. The defendant submits

A that it is this court that has the power, under its inherent jurisdiction, to investigate this allegation of an abuse of process, at the trial of this tax claim. The defendant therefore says that summary judgment is not appropriate.

B **[125]** My judgment on this point and my reasons are as follows. I find that this second point is weak and lacks cogency. The trial of this tax claim, if there is going to be one, will not be spent investigating whether the LHDN has abused the process of the court by filing this tax claim against the defendant, to recover tax as a debt. Particularly so when the defendant did not plead this abuse-of-process defence, nor the material facts that may give C rise to the defence.

Third Point: This Court Is Not Prohibited From Entertaining The Issue Of An Abuse Of Process, And Should Do So At The Trial

[126] This third point is about ss. 103 and 106. Subsection 103(2) provides D that any tax amount that is assessed is due and payable. Subsection 106(1) provides that any tax that is due and payable may be recovered by the LHDN as a debt due to the Government. Subsection 106(3) provides that in a tax recovery proceeding (like this tax claim), the presiding court shall not – in mandatory language – entertain any plea that the tax amount sought to be E recovered is: (i) excessive, (ii) incorrectly assessed, (iii) under appeal, or (iv) incorrectly increased. But, the defendant argues that abuse of process is not included in these four prohibited pleas. And so this court can entertain the plea of abuse of process and decide on it.

[127] My judgment on this issue and my reasons are as follows. I do not F accept the defendant's suggestion. To my mind, the allegation that filing this tax claim is an abuse of process, is a challenge against the propriety of the LHDN's tax assessment. The defendant is effectively asserting that the LHDN either should not have made any tax assessment at all or should not have made the tax assessment for RM1,053,972,936.58 (because this tax G claim money might be the same money as the money claimed in Suit 330). To me, this bears directly on the "incorrectly assessed" prohibited plea, and likely to bear on the "excessive" plea too. And sub-s. 106(3) states that I am not to entertain these categories of pleas.

[128] Further, besides annexing Suit 330's amended writ and statement of H claim to his written submissions in reply (encl. 33), the defendant has not produced any evidence (whether by affidavit or documentary evidence) that the filing of this tax claim is an abuse of process. There is also no evidential basis to support an inference that there is a likelihood of an abuse of process.

[129] In the premises, I am not satisfied that the filing of Suit 330 against I the defendant constitutes "some other reason" that warrants a trial of this tax claim.

Conclusion

[130] The test under O. 14 r. 3 is that summary judgment should not be granted:

(i) if there is a triable issue *ie*, "an issue or question in dispute which ought to be tried". In other words, an issue that should not be decided summarily on the pleadings or the preponderance of affidavit evidence, but must necessarily be decided only after the rigours of the trial process; or

(ii) if "there ought for some other reason to be a trial" to decide on the claim.

[131] In my judgment, for all the reasons set out earlier, I find that there is neither a triable issue nor "some other reason" for there to be a trial to determine this statutory tax claim. I therefore allow the LHDN's application to enter judgment for RM1,053,972,936.58 with interest at 5% per annum from the date of this judgment to the date of full realisation, with costs of RM15,000, which is subject to the allocator.